No. 284.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,

Appellants,

VS.

J. M. DOUGLASS ET AL.,

Appellees.

Brief for Appellants.

W. E. F. DEAL,

Attorney for Appellants.

H. S. CROCKER COMPANY, PRINTERS, S. F.

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STATEMENT OF THE CASE.

This proceeding was brought in the court below by J. M. Douglass, originally as plaintiff, against appellants and the South End Mining Company as defendants, in the District Court of the State of Nevada, Lyon county, under the provisions of the Act of the Legislature of the State of Nevada entitled, "An Act "to Encourage the Mining, Milling, Smelting or other "Reduction of Ores in the State of Nevada," approved March 1, 1875 (General Laws of Nevada, Bailey & Hammond, 1885, Sections 256 to 273, both inclusive).

The case was removed by the defendants from the State Court to the Circuit Court of the United States, Ninth Circuit, District of Nevada. After the removal the Goodman Mining Company was, by the order of the court below, made a party plaintiff (Record, p. 30). Appellants filed an answer to the order to show cause and to the petition or complaint. The court below overruled the objections made by the answer. The decision set forth in the Record (pp. 140–151) was rendered by the court below upon the hearing of the objections to the answer.

Joseph R. Ryan, H. M. Gorham and H. M. Clemmons were then appointed Commissioners to ascertain and assess the compensation to be paid to the defendants having or holding any right, title or interest in or to the tracts of land or mining claims described in the pleadings for or in consideration of such lands to the use of petitioners. Before the hearing was concluded the South End Mining Company settled with the plaintiffs (Record, p. 30).

The Commissioners, after taking testimony and performing the other duties required of them, made their report and findings to the court below (Record, pp. 32, 33).

The defendants, except the South End Mining Company, moved the court below to set aside the report and grant them a new trial upon the grounds and objections set forth in the Record, pp. 34–41.

The court below overruled defendants' objections, and denied their motion for new trial (Record, p. 41).

Appellants filed their bill of exceptions and specifications of errors in the court below, which were duly settled and allowed (Record, p. 136). Appellants moved the court below for an appeal to this court, which was allowed (p. 138).

ASSIGNMENT OF ERRORS MADE IN THE COURT BELOW.

The order and decree of said Circuit Court is erroneous and against the just rights of said defendants for the following reasons:

First—The evidence showed that a part of the right of way sought to be condemned consisted of a tunnel which was owned by the defendants James D. Byrnes and Edward Mulville, who were also owners of the Atlantic Consolidated mine, for the working of which said tunnel was constructed by the predecessors in interest and grantors of defendants James D. Byrnes and Edward Mulville. The evidence showed that at the time of the commencement of this suit and proceedings J. M. Douglass, one of the plaintiffs, was in possession of said tunnel, as tenant of the defendants Byrnes and Mulville. That said tunnel had, before the time when J. M. Douglass became said tenant, been run and completed a distance of 648 feet from its mouth, and that said tunnel was a part of said Atlantic Consolidated mine, and was the lowest adit of said mine, and the most convenient means of working the same. And these defendants show that said tunnel was, at the time of the

commencement of these proceedings and suit, already used by defendants Byrnes and Mulville, and their tenants, for mining purposes, and defendants show that said tunnel was not, under the provisions of said Act of the Legislature, subject to condemnation for the use of any other persons, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose (pp. 42, 43 of Record).

Second—The decision of said Circuit Court confirming said report and denying said motion for new trial was erroneous in that the Commissioners in their report found and decided that H. C. Biggs and Maggie Lee McMillan are the owners each of an undivided one-fourth interest in the Contact claim and mine and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary line of the Contact claim, and said Commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation whatever for said tunnel through the Contact claim, or for said right of way through said Contact claim (p. 111 of Record).

Third—The decision of said Circuit Court confirming said report and denying said motion for a new trial is erroneous in that the Commissioners in their report decided and found that H. C. Biggs and Maggie Lee McMillan are the owners of the Annie and Clinton mines, and that the Red Jacket Consolidated Mining Company is the owner of the Red Jacket mine, and that the petitioners are entitled to the right of way for

the tunnel mentioned in the amended petition through each of said mines, and no compensation whatever is awarded the said owners of said mining claims, or either of them, for said right of way (pp. 111, 112 of Record).

Fourth—The said decision of said Circuit Court in confirming said report and denying said motion for new trial is erroneous in that the completed tunnel through said Contact claim from the mouth of said tunnel to the western boundary line of said Contact mine, a distance of 299 feet, was worth at the very least $2,990, and it would have cost the plaintiff at least $2,990 to construct such a tunnel to the west line of said Contact claim, and yet said Commissioners did not award any compensation to the owners of said tunnel for said tunnel, or the right of way through said Contact claim (p. 112 of Record).

Fifth—The said decision of said Circuit Court in confirming said report and denying said motion for a new trial is erroneous in that the tunnel through said Atlantic Consolidated mine and into the Annie ground already constructed by the owners of the Atlantic Consolidated mining claim and their predecessors in interest and grantors, the same being 349 feet in length, was worth $2,000, and it would have cost plaintiff $2,000 to construct the same; yet the Commissioners awarded James D. Byrnes and Edward Mulville $1,021.95 (pp. 112, 113 of Record).

Sixth—The said decision of the Circuit Court in confirming said report and denying said motion for new trial is erroneous in that no compensation is

awarded by the Commissioners for the damage sustained by the defendants H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company by the wrongful acts of plaintiff J. M. Douglass in running the tunnel through the ledge in the right of way condemned, through the Annie, Clinton and Red Jacket mines, and in taking out the ore excavated in running the tunnel, and throwing it away instead of saving it for the owners thereof.

The evidence showed that immediately after these proceedings commenced plaintiff J. M. Douglass, under an order of court made in the case under the statute, took possession of the right of way described in the amended petition, and ran a tunnel upon the ledge, through the Annie, Clinton and Red Jacket claims, and threw pay ore away over the dump, so that by his acts it was lost to the owners of said claims (p. 113 of Record).

FACTS ESTABLISHED BY THE TESTIMONY TAKEN BEFORE THE COMMISSIONERS.

The Atlantic Consolidated mining claim was, at the time of the commencement of these proceedings, and ever since has been, owned by the appellants James D. Byrnes and Edward Mulville. The Commissioners so report and find (Record, p. 32): * * * "James " D. Byrnes and Edward Mulville are the owners of the " Atlantic Consolidated Mine," and they also report and find (Record, p. 33): "*Sixth*—We find the right " of way through the Atlantic Consolidated mine is of

" the value of one thousand twenty-one dollars and " ninety-five cents, and we accordingly assess the " damages to said mine at said sum, to be paid to " defendants James D. Byrnes and Edward Mulville " the owners." These findings, as to title, are in accordance with the allegations of the petition and the proofs (Record, pp. 7, 43–45).

A United States patent was issued to the Atlantic Consolidated Mining Company, one of the predecessors in interest and grantors of appellants Byrnes and Mulville, on April 29, 1876 (Record, p. 43). A judgment was rendered in the State District Court on June 24, 1891, in favor of J. D. Blackburn against the Atlantic Consolidated Mining Company for $1,132 and interest and costs. Upon this judgment an execution was issued, under which the Atlantic Consolidated mine was levied on and sold to W. E. F. Deal, to whom a certificate of sale was issued. This certificate was assigned by the purchaser to William Feehan. No redemption from the sale having been made, the Sheriff conveyed the property to William Feehan on February 16, 1892, who afterward and on March 19, 1892, conveyed the property to James D. Byrnes and J. J. Green, and on February 25, 1893, J. J. Green conveyed his interest to Edward Mulville (Record, pp. 43, 44).

A tunnel had been constructed by the Atlantic Consolidated Mining Company before the patent was issued to work and drain the Atlantic Consolidated mine. This tunnel had been constructed a distance of 648 feet by the company (page 115) before the appellee Douglass came into possession of it as the tenant of

the Atlantic Consolidated Mining Company. It commenced on a claim formerly known as the Cadiz, which claim at one time was owned by the company. The Cadiz claim became subject to relocation by failure to do the necessary work to hold it under the United States mining laws, and was relocated by Thomas P. Mack, who lost it in the same way, and it was then again located under the name of the Contact claim by C. E. Brown, in 1890 (Record, p. 45; testimony of Thomas P. Mack, p. 50). Before this location of the Contact was made the tunnel penetrated the company's ledge (Thomas P. Mack, p. 50). This tunnel is the lowest tunnel through which the company's claim can be worked, and it is necessary to the working of the claim (Thomas P. Mack, p. 55; James D. Byrnes, p. 101).

The testimony showed, without any conflict, whatever, that this tunnel was run and owned by the predecessors in interest and grantors of appellants Byrnes and Mulville. It was laid down upon the plat accompanying the patent as part of the grantee's work.

Testimony of Thomas P. Mack, pp. 55–59.
" " W. H. Stanley, pp. 94–98.
" " F. S. Lacrouts, pp. 73, 74.
" " J. D. Byrnes, pp. 100, 101.
" " J. D. Blackburn, pp. 101–103.
" " Theodore Vincent, p. 103.
" " J. F. Angell, p. 106.
" " J. B. McJilton, p. 107.
" " Joseph M. Douglass, pp. 91, 92.

The history of the means taken by appellee Douglass to get the tunnel, as shown by the evidence, is substantially as follows: He first attempted to get it from the Atlantic Consolidated Mining Company by writing to Mr. Green, one of its officers, about it (testimony of Douglass, pp. 91, 92). This was before he bought an interest in the Contact claim. W. H. Stanley, on the 22d day of March, 1890, obtained a lease of the Atlantic Consolidated mine from the company for a term of two years (see Exhibit A to Answer, pp. 23–25). Stanley immediately entered into possession of the mine and its appurtenances, including this tunnel through which he intended to do his work. He found that C. E. Brown had located the Contact claim upon which the mouth of the tunnel was located, and to avoid trouble with Brown he purchased the Contact ground from him (W. H. Stanley's testimony, pp. 93–98; Deed, pp. 46–48).

After Stanley got his lease and bought the Contact claim, appellee Douglass sent one Frank Muhlbeyer to Stanley, who represented that he, Muhlbeyer, wanted to work the ground under the lease. Stanley on the 16th day of September, 1891, assigned his lease to Muhlbeyer, and at the same time conveyed to him an undivided one-half interest in the Contact claim (Record, pp. 44–49).

Douglass employed Muhlbeyer to take the assignment and deed in his name for him and paid the consideration for both (testimony of Douglass, p. 77).

As soon as Muhlbeyer got the lease and deed he reassigned the lease to Douglass and made him a deed

of the interest in the Contact, and Douglass immediately entered into possession of the tunnel and mine and did work and took out ore under the lease (Stanley's testimony, p. 97; Douglass' testimony, p. 79).

After Douglass obtained possession of the tunnel in the manner mentioned, the appellants Byrnes and Mulville commenced an action of ejectment in the State Court against him to recover possession of the tunnel (J. D. Blackburn's testimony, pp. 68–70).

He then on the 6th day of February, 1893, attempted to get some right to the tunnel in question by making a tunnel location under Section 2323 of the Revised Statutes of the United States (Record pp. 25–28).

The attempted tunnel location describes a tunnel exactly as the one sought to be condemned in these proceedings is described.

Compare description in complaint, pages 5 and 6, with the description in the notice of location, pages 25–28. It must be remembered that the proposed tunnel right commenced on the Contact claim, and ran through it to the Atlantic Consolidated claim, and through it to the Annie claim, and through it to the South End claim, and through it to the Red Jacket claim, and through it to the Clinton claim, and through it to the Goodman claim. Every one of these claims, at the time of the tunnel location, was owned, held and worked in compliance with the laws of the United States, and three of them were held in fee simple under U. S. Patents. No part of the tunnel location ran through vacant or unoccupied ground. Instead of being run to find blind ledges, it had already been

run by the Atlantic Consolidated Mining Company and its grantees 648 feet through its ledge, and when Douglass entered into possession of this tunnel and mine as the tenant of Byrnes and Mulville he commenced to extend the tunnel in the vein in the face of the tunnel, and continued it in the vein the whole distance, requiring the parties with whom he contracted to run the tunnel in the vein the whole way (Douglass' testimony, pp. 83–110).

A tunnel right can only be located upon vacant land (*Roco Co.* vs. *Enterprise Co.*, 53 Fed., 34). The tunnel was in ore most of the way from the time that Douglass commenced work on it, after he got the lease. The ore and waste rock were broken down together, and carried out together and thrown together in the creek, and the ore was lost forever to the owners. The ore was pay ore, as abundantly shown by the testimony.

Thomas P. Mack says, page 51: "Within the ledge "there are spots that look like good ore. Some spots "would pay to extract and work. In the Annie "ground I don't think half of the distance would pay. "I don't think half of the distance would pay in the "Red Jacket. As to the Clinton, I think possibly "half of the distance would pay to extract" (p. 52). This witness is speaking of the vein as it appears in the tunnel after its construction—after Douglass had taken out the ore and thrown it away. This witness says: "I don't think any human being can tell what the "value of the ore was which was taken out by the ex-"cavation of the tunnel" (p. 54).

Mr. Douglass speaks of some ore that was saved at the mouth of the tunnel, but this was but four tons

which had been separated from the waste (pp. 79–83). All the rest of the ore was thrown away with the waste.

Testimony of W. S. Cummings, p. 115.
" " G. W. Debus, p. 115.
" " Charles Pollock, p. 115.
" " George Roach, p. 116.
" " Albert S. Purdy, p. 116.
" " W. H. Naileigh, p. 117.
" " R. C. Hunt, p. 130.
" " E. J. Powers, p. 114.

This Court will see from this testimony that the tunnel was run in pay ore. The men employed to run the tunnel by Mr. Douglass worked it at so much a foot. Their object was to make as many feet per day as possible, and they were under no instructions to save ore. The ore if saved at all had to be saved as it was broken from its place.

W. H. Naileigh, one of the miners employed by Douglass, located a placer claim to cover the pay ore taken out of this tunnel and thrown away (p. 125). After the tunnel had been run through the Annie, Red Jacket and Clinton claims pay ore was taken from the bottom, top and sides of this tunnel by the owners of these claims and worked at a profit.

Debus testified that the ore from the Annie claim was worth $35 or $40 per ton; that from the Red Jacket, $60 to $90 a ton. The assays from the Clinton ran from $130 to $289 a ton. Forty tons from the ledge paid $1,254. Purdy testifies there was 63 tons of $22.50, 40 tons of $31.25, and 13 tons of $60 rock

taken from the tunnel from the Red Jacket, Annie and Clinton claims. W. H. Naileigh says: "I don't think "there was over $1,000 to $1,500 worth of ore thrown "in the creek from the Red Jacket and Clinton "claims" (p. 127).

Against all this positive, direct, conclusive testimony there was nothing whatever before the Commissioners except expert testimony based upon examinations, and very imperfect ones, after the tunnel had been constructed and all the ore taken out in the excavation thrown away. There was no conflict in the testimony as to the value of the ore while the tunnel was being run, nor as to the value of that taken out immediately from the top, bottom and sides of the tunnel after it was run. Neither Commissioners nor Courts can take expert testimony—mere opinions of witnesses—against undisputed facts; much less can they do so when the expert testimony is based upon imperfect or defective examinations.

The best evidence—the ore itself—was destroyed by the party against whom this positive testimony is given. The witnesses who examined the ledge to testify on the part of petitioners did so in a very superficial and imperfect manner. Samples were taken at every ten steps, and these samples assayed. It scarcely requires argument to show that such samples could not and did not furnish an average of the ledge itself.

All these wrongs were perpetrated by the appellant Douglass under the authority of the right of possession of this tunnel, given him in these proceedings. The

petitioners have not only taken appellants' property for their own private use, under cover of a beneficent statute, but under the same cover they have, in exercising the authority given them, wantonly destroyed the very substance of appellants' estates, without any compensation. Appellees do not intend and never intended to use the tunnel and right of way for any other than their own private purposes, to the exclusion of appellants from their own property, acquired by them under the authority of the mining laws of the United States (see testimony of J. M. Douglass, pp. 110, 111). The Commissioners give to appellees the exclusive use of the whole right of way (see Second, p. 32).

I.

The court below erred as set forth in the first assignment of error.

The tunnel was at the time of the commencement of these proceedings already used by appellants Byrnes and Mulville and their tenant for mining purposes, and said tunnel was not under the provisions of said Act of the Legislature subject to condemnation for the use of appellees, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose.

The proceedings to condemn the tunnel were not authorized by the act which was invoked in aid of appellees, after the commencement of this action. The tunnel was already devoted to the public use designated

by the statute. The Legislature did not intend that a mining construction, owned by one person, should be taken away and given to another to use for the same purpose. Such a construction destroys the very purpose of the act. No such power is expressly given, and, without express provision, such power does not exist.

Matter of *N. Y. L. & W. R. Co.*, 99 N. Y., 23.

Citing:

B. & A. R. R. Co., 53 N. Y., 574.
N. Y. C. & H. R. Co., 63 N. Y., 326.
Rochester Water Comm'r, 66 N. Y., 413.
City of Buffalo, 68 N. Y., 168.
P. P. & C. I. R. Co. vs. Williamson, 91 N. Y., 552.
O. C. R. R. Co. vs. Bailey, 3 Oregon, 175.
C. C. R. Co. vs. Moss, 23 Cal., 330.
S. F. & A. W. Co. vs. A. W. Co., 36 Cal., 647, 648.
N. J. & S. R. R. Co. vs. L. B. Com'rs, 39 N. J. L., 36.
Bridgeport vs. R. R. Co., 36 Conn., 255.
Davis vs. Nichols, 39 Ills. App., 620.
S. R. T. Co. vs. City, 128 N. Y., 510.
Housatonic etc. R. R. vs. Lee etc., 118 Mass., 391.
B. & M. R. Co. vs. L. & L. R. Co., 124 Mass., 386.
B. O. & C. R. R. Co. vs. North, 103 Ind., 486.
Mills Em. Dom., Secs. 46, 47.
Pasadena vs. Stimson, 91 Cal., 238.

"Such authority cannot be implied from a grant of "power to condemn, made in general terms. Express "legislative authority is requisite, and this authority "must be in clear and express terms, or by necessary "implication, leaving no uncertainty as to the intent."

Mills Em. Dom., Sec. 46.

And the use must be a different use from the old.

L. S. R. Y. vs. *Chicago etc.*, 97 Ills., 506.
Peoria Ry. Co. vs. *Peoria etc.*, 105 Ills., 110.
Chicago Ry. vs. *Chicago etc. R. R.*, 112 Ills., 589.
N. C. R. R. vs. *C. C. R. R.*, 83 N. C., 489.
Springfield vs. *C. R. R. Co.*, 4 Cush., 63, 71.
In re Road vs. *S. Town*, 91 Pa. St., 260.
Valparaiso vs. *G. T. R. Co.*, 24 N. E., 249 (Ind.).
Seymore vs. *J. etc. Ry. Co.*, 26 N. E. Rep., 188 (Ind.).
A. V. R. R. Co. vs. *P. J. R. Co.*, 122 Pa. St., 511.
Appeal Sharon Ry. Co., 122 Pa. St., 533.
U. N. etc. Co. vs. *N. D. etc. Co.*, 18 Atl. Rep., 574 (N. J.).
Anniston vs. *Jacksonville*, 82 Ala., 300.
M. E. R. Co. vs. *Newark*, 2 Stockt., 361.
Little Miami vs. *Dayton*, 23 Ohio St., 510.
P. R. Co's Appeal, 93 Pa. St., 150.
State vs. *Montclair*, 35 N. J. L., 330, 331.

Douglass could not, while tenant of the appellants Byrnes and Mulville, acquire any title to any of the property he held under the lease. Whatever adverse titles, including the interest in the Contact claim, he

acquired during his tenancy, he could only hold as trustee for appellants.

Rector vs. *Gibbon*, 111 U. S., 276.

Byrnes vs. *Douglass*, 44 Pacific Reporter, not published.

The tunnel was a part of the mine itself.

Book vs. *Justice M. Co.*, 58 Fed. R., 117; Sec. 2324 Revised Statutes U. S.

The patent conveyed the tunnel by necessary implication.

Appellants Byrnes and Douglass were entitled to compensation for that part of the tunnel outside the claim the same as for that within it, yet they were awarded nothing for the parts outside.

II.

The court below erred as set forth in the second assignment of error.

The Commissioners, by their report, decided that H. C. Biggs and Maggie Lee McMillan are the owners of an undivided one-fourth interest in the Contact claim and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary of the Contact claim, and said Commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation for said tunnel through the Contact claim or for the right of way through said claim. This tunnel was through solid blasting rock the whole distance, and cost at least ten dollars per foot to construct (testimony of R. Lamb, p. 112; E. T. Powers, p. 112).

The smallest cost of the tunnel testified to by any one was by W. H. Naileigh, who makes it $5 per foot, which would make for the 299 feet $1,495.

III.

The court below erred as set forth in the third assignment of error. The Commissioners decided and found that H. C. Biggs and Maggie Lee McMillan are owners of the Annie and Clinton claims, and that the Red Jacket Company is the owner of the Red Jacket claim, and that the petitioners are entitled to the right of way for the tunnel through each of said mines, and no compensation was awarded the said owners or either of them for said right of way.

IV.

The court below erred as set forth in the fourth specification of error.

The evidence showed that while Douglass was in possession of the tunnel in question as tenant of appellants Byrnes and Mulville he purchased an undivided interest equal to one-half of the Contact claim at the same time that he became such tenant and took possession of the property leased, together with said tunnel. The interest so purchased Douglass could only hold in trust for appellants Byrnes and Mulville, and the Commissioners should have awarded compensation to appellants Byrnes and Mulville for the right of way and tunnel through the Contact claim which the evidence shows were of the value of $2,990. The lowest cost of this tunnel fixed by any one was $1,495.

V.

The court below erred as set forth in the fifth specification of error.

The Commissioners found that the appellants Byrnes and Mulville were entitled to no compensation for the completed tunnel 648 feet in length outside of that part through the Atlantic Consolidated claim, for which they assessed the damages at $1,021, while the evidence shows that the whole of said tunnel was worth at the very lowest estimate placed thereon by any witness $5 per foot for the first 299 feet, and $4 per foot for 349, which would make $2,891 instead of $1,021.

VI.

The court below erred as set forth in specification sixth.

The Commissioners awarded no compensation whatever for the damages sustained by the appellants H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company, for the ores taken out by the appellee Douglass, in extending the tunnel through the Annie, Clinton and Red Jacket claims, which ore was broken down with the waste rock and dumped together in the creek, and forever lost to appellants. The evidence as already set forth shows the value and character of the ores so taken and thrown away.

The findings and report of the Commissioners must have been based upon a misapprehension of the testimony and an erroneous view of the legal rights of the owners of the property taken.

Neither the Constitution of the State of Nevada nor the statutes of that State permit any real or imaginary advantages or benefits to the owners resulting from the taking of their property to be offset against the compensation required to be made.

Section 8, Article 1, of the Constitution of Nevada provides that private property shall not be taken for public use without *just* compensation having been first made or secured.

The statutes of the State require the Commissioners to ascertain and assess the compensation to be paid for private property so taken. The compensation so to be awarded is not the mere market value of the land taken.

V. & T. R. R. Co. vs. *Henry*, 8 Nevada, 165.

The alleged benefit to appellants, testified to by some of the witnesses, is the increase claimed to have been caused in the value of the mining claims by the development of a vein of pay ore. This claim is inconsistent with the finding of the Commissioners, that no pay ore was found or destroyed, but this benefit is neither direct nor peculiar, but a general one, which would have resulted from the developments of this very vein, which appellants owned, and which they discovered before any location was made. This vein was exposed on the face of the tunnel before appellee ever put a pick into it.

Mills on Eminent Domain, Chapter XV, Secs. 149–154.

Lewis on Eminent Domain, Secs. 467–471.

The courts of Maryland, Nebraska, Virginia, West Virginia and Wisconsin hold that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.

Lewis on Eminent Domain, Sec. 467.

The courts of Georgia, Kentucky, Louisiana and Texas hold that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.

Ib., 468.

Those of Connecticut, Kansas, Maine, Minnesota, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Vermont hold that special benefits only may be set off against both the value of the part taken and damages to the remainder.

Ib., Sec. 469.

The courts of Alabama, California, Delaware, Illinois, Indiana, New York, Ohio, Oregon and South Carolina hold that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken.

Lewis on Eminent Domain, Sec. 470.

The author of the last work on eminent domain lays down the rule that when a part of a tract is taken the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon what remains.

Apply this rule to the facts of this case. Here a completed tunnel 648 feet in length just as essential to the use (which was the same as that for which it was taken) of the owners was taken from the owners, and the owners excluded from it and no compensation allowed them for any part of the completed tunnel except that within the boundary lines of the Atlantic claim. More than two-thirds of this tunnel was taken without any compensation being awarded the owners for it. It cannot be pretended that any ore was developed by appellee in this completed tunnel, for nothing was done on this except to repair it, and the owners were absolutely excluded from any use of this tunnel.

So much for the manner in which that part of the tract was taken, and the purpose for which it was taken, nor can it be pretended that the effect upon what remained benefited the owners, as by this taking they were prevented from working their mines by the most convenient means they had or could have.

As to the remainder of the right of way through the Annie, Red Jacket and Clinton claims, the same may be said except that the tunnel had to be run, but the evidence shows that the tunnel was run in pay ore in the vein located and owned by the other appellants. And the ore broken was down with the waste and thrown away, and when these owners ask for compensation for the right of way taken from them and for the damages done in the taking, they are answered by the report of the Commissioners that they are entitled to nothing, because appellees developed the vein, which they discovered, located and owned.

Appellants respectfully ask that the decree be reversed, with such directions as may be proper under the facts and circumstances of this case.

Respectfully submitted,

W. E. F. DEAL,
Attorney for Appellants.